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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FREE STREAM MEDIA CORP. d/b/a SAMBA TV ,

Plaintiff,

v.

ALPHONSO, INC., ASHISH CHORDIA, RAGHU KODIGE and LAMPROS KALAMPOUKAS ,

Defendants.

Case No. 3:17-cv-02107-RS

**DEFENDANTS' OPPOSITION TO MOTION TO REVIEW CLERK'S ORDER TAXING COSTS AND TO STAY ENFORCEMENT OF COSTS**

Date: April 25, 2019
Time: 1:30 pm
Place: Courtroom 3, 17th Floor
Judge: Hon. Richard Seeborg

## I. INTRODUCTION

The Court should deny Samba's motion to review the order taxing costs. *See* Dkt. No. 402 ("Mot."). On December 28, 2018, the Court granted summary judgment in Alphonso's favor and entered judgment accordingly. *See* Dkt. Nos. 367, 368. Pursuant to the judgment, Alphonso submitted its Revised Bill of Costs, seeking $61,174.61 in costs. *See* Dkt. No. 393 ("Bill of Costs"). The Clerk of Court taxed the full amount (*see* Dkt. No. 401) over Samba's objections (*see* Dkt. No. 399).

This motion is another example of Samba's leave-no-stone-left-unturned litigation strategy. The parties have spent millions of dollars to litigate this case, and no less than seventeen attorneys from three law firms have worked on this case on Samba's behalf. Yet Samba now seeks to reduce costs by $17,623.35. Samba has expended at least this much by filing this motion.

None of Samba's arguments have merit. Samba argues that three types of costs related to deposition transcripts/video recording are not taxable: (1) copies of deposition transcripts; (2) video services; and (3) searchable and hyperlinked deposition exhibits. Courts have in fact allowed costs associated with video services and scanning of deposition exhibits. Samba's motion completely ignores case law that contradicts its arguments here, and the Court should therefore reject Samba's arguments.

Samba also asks the Court to exercise its discretion to deny or reduce costs, but there is no basis for Samba's request. Samba argues that the Court should deny or reduce the amount of costs owed to Alphonso because the issues in the case were allegedly difficult and because Samba litigated in good faith. But, Samba has identified nothing more than run-of-the-mill litigation conduct. For example, Samba was ***required*** to litigate in good faith, under Federal Rule of Civil Procedure 11 and other applicable authorities. If Samba's argument were accepted here, a prevailing party would never be entitled to costs. And Samba falls short of meeting its burden that a stay of costs is appropriate here. To the contrary, a stay would be prejudicial to Alphonso.

For these reasons, the Court should deny Samba's motion and order that Samba pay the taxable costs immediately.

## II. LEGAL STANDARD

"Rule 54(d) creates a presumption for awarding costs to prevailing parties; the losing party must show why costs should not be awarded." *Save Our Valley v. Sound Transit*, 335 F.3d 932, 944–45 (9th Cir. 2003); *see* Fed. R. Civ. P. 54(d)(1) ("[C]osts—other than attorney's fees—should be allowed to the prevailing party."). "[A] district court need not give affirmative reasons for awarding costs; instead, it need only find that the reasons for denying costs are not sufficiently persuasive to overcome the presumption in favor of an award." *Save Our Valley*, 335 F.3d at 945; *see Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000) ("A district court must specify reasons for its refusal to award costs.") (internal quotation marks omitted). This is because "[t]he presumption itself provides all the reason a court needs for awarding costs[.]" *Save Our Valley*, 335 F.3d at 945.

Section 1920 identifies six categories of taxable costs:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Civil Local Rule 54 provides further guidance as to what costs are taxable.

## III. ARGUMENT

### A. Alphonso's Bill of Costs

Samba seeks to deduct from the following costs: (1) copies of deposition transcripts; (2) video services; and (3) electronically searchable and hyperlinked deposition exhibits. The total reduction would save a total of $17,623.35. The Court should overrule each of these objections.

#### 1. Costs Related to Video Services Are Taxable

Alphonso's costs of $4,257 for Video Services and $1,317 for Video Transcript Rate are taxable. The Video Services costs are related to the depositions of W. Christopher Bakewell, Samba's damages expert, and Ivan Zatkovich, Samba's technical expert. "Video Services"

include video-related fees, such as synchronization. The Video Transcript Rate is a charge for the court reporter to listen to the deposition audio to ensure the transcript synchs to the video correctly. Had this case proceeded to trial, these services would have been "reasonably necessary to assist the jury or the Court in understanding the issues at the trial." Civ. L.R. 54-3(d)(5); *see City of Alameda, Cal. v. Nuveen Mun. High Income Opportunity Fund*, No. C 08-4575 SI, 2012 WL 177566, at *2 (N.D. Cal. Jan. 23, 2012) ("The Court finds that these costs are recoverable because, if this case had proceeded to trial, ***synchronized videotaped depositions would have assisted the jury in understanding the evidence in this case***, much of which was complicated.") (emphasis added); *Hynix Semiconductor Inc. v. Rambus Inc.*, 697 F. Supp. 2d 1139, 1150 (N.D. Cal. 2010) (overruling objection to costs of synchronizing deposition videos and citing Civil Local Rule 54-3(c)).

In its motion, Samba speculates, with no evidentiary support, that Video Services may have included fees for expedited delivery. *See* Mot. at 6. In requesting that such fees be rejected, Samba ignores precedent in this District holding that such costs "may be allowable where circumstances warrant expedited transcription of testimony." *Vectren Commc'ns Servs. v. City of Alameda*, No. C 08-3137 SI, 2014 WL 3612754, at *3 (N.D. Cal. July 22, 2014). Such is the case here. Messrs. Bakewell's and Zatkovich's depositions took place on October 17, 2018—ten days after the close of expert discovery (*see* Dkt. No. 293) and less than a month before dispositive motions were due (*see* Dkt. No. 305). In light of these deadlines, "[t]he costs to expedite the depositions therefore were not 'extra;' they were necessary under the circumstances of this case." *Meier v. United States*, No. C 05-04404 WHA, 2009 WL 982129, at *2 (N.D. Cal. Apr. 13, 2009).

**2. Costs Related to Hyperlinked Deposition Exhibits Are Taxable**

The Court should also reject Samba's objection to $12,049.35 for costs associated with scanning and creating electronically searchable deposition exhibits. Civil Local Rule 54-3(c) provides that "[t]he cost of reproducing exhibits to depositions is allowable if the cost of the deposition is allowable." *See Vectren*, 2014 WL 3612754, at *4 ("The costs for . . . electronic scanning of exhibits are also recoverable.") (citing 28 U.S.C. § 1920(2); Civ. L.R. 54-3(c)(3)); *City of Alameda*, 2012 WL 177566, at *3 ("The Court agrees with Alameda that costs for

electronic scanning of exhibits are recoverable under Civil Local Rule 54–3(c)(3), and OVERRULES this aspect of plaintiffs' objection."). Samba does not dispute that the costs of the depositions are allowable. The costs of scanning the exhibits are therefore also allowable.

Samba's cited authorities do not support its argument. The documents at issue in *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 929 (9th Cir. 2015), were part of a document production, not deposition exhibits. Thus, Civil Local Rule 54-3(c)(3), which expressly provides for such costs, did not apply.

Samba also cites two out-of-circuit district court cases, which operate under different local rules. *See* Mot. at 7 (*In re: Whirlpool Corp.*, No. 1:08-WP-65000, 2015 WL 11995255 (N.D. Ohio Feb. 18, 2015) and *E.E.O.C. v. Ford Motor Co.*, No. 11-13742, 2012 WL 5947649 (E.D. Mich. Nov. 28, 2012)). These cases are factually distinguishable. The court in *In re: Whirlpool* rejected $133,843.66 claimed for photocopying and exemplification of documents, binding, tabbing, and creation and duplication of CDs. 2015 WL 11995255, at *5. Alphonso does not seek costs related to these tasks. And in *E.E.O.C.*, the court found that "exhibit copies and delivery fees are generally reasonable and necessary[.]" 2012 WL 5947649, at *1. Although that court disallowed "'hyperlinked exhibits on CD' and tabbing exhibits"—the latter of which Alphonso does not claim—it cited no rule for doing so. *Id.* Notably, Civil Local Rule 54-3(c)(3) does not provide any exclusions for hyperlinked exhibits.

**B. <u>There Is No Basis to Deny or Reduce Costs</u>**

Samba has not carried its burden of establishing that the Court should depart from the presumption in favor of awarding costs. The Ninth Circuit has approved several reasons for denying costs, including: "(1) a losing party's limited financial resources; (2) misconduct by the prevailing party; and (3) the chilling effect of imposing high costs on future civil rights litigants." *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1022 (9th Cir. 2003) (citation, ellipses, and internal quotation marks omitted). The Ninth Circuit has also "noted with approval . . . that other circuits have held that the following factors are appropriate: (1) the issues in the case were close and difficult; (2) the prevailing party's recovery was nominal or partial; (3) the losing party litigated in good faith; and, perhaps, (4) the case presented a landmark issue of national

importance." *Id.*

None of the *Champion Produce* factors are present here. Samba only addresses two of these factors. *First*, Samba contends that the issues here were close and difficult and that Samba litigated in good faith. Mot. at 8. Samba's only basis for arguing that this case raised "issues that were far from straightforward or simplistic" is that that there was "substantial disagreement regarding [the] scope" of *Centillion Data Systems, LLC v. Quest Communications International*, 631 F.3d 1279 (Fed. Cir. 2011). *See* Mot. at 8. This is insufficient for Samba to establish that the Court should ignore presumption of taxing costs. Indeed, it is hardly noteworthy that parties to a patent litigation would at some point dispute the applicability of a Federal Circuit case. This is to be expected in the normal course of litigation.[1]

*Second*, as discussed in Alphonso's motion for attorneys' fees (Dkt. No. 379-4) and opposition to Samba's Rule 59(e) motion (Dkt. No. 386-4), there is a serious question as to whether Samba acted in good faith when it filed its last-minute infringement contentions based on theories that "[b]y no stretch" (Dkt. No. 371 at 11) could amount to infringement. And, in any event, Samba is not entitled to a denial or reduction of costs simply because it ostensibly litigated in good faith. Samba was already required to litigate in good faith, including under Federal Rule of Civil Procedure 11, Civil Local Rule 11-4, and other applicable rules of professional conduct. If the Court denied costs based on Samba's argument, no prevailing party would ever be entitled to costs under Rule 54. *See, e.g.*, *Mandujano v. Geithner*, No. C 10-01226 LB, 2011 WL 3566398, at *2 (N.D. Cal. Aug. 12, 2011) (good faith "is insufficient to justify the denial of costs to a prevailing party"); *see also Universal Stabilization Techs., Inc. v. Advanced Bionutrition Corp.*, No. 17CV87-GPC(MDD), 2018 WL 6181478, at *2 (S.D. Cal. Nov. 27, 2018) ("[B]ringing a case in good faith, alone, is not sufficient to deny costs because a plaintiff is at all times legally and ethically obligated to act in good faith and to deny costs on grounds of good faith alone would render Rule 54(d) meaningless in every situation where the unsuccessful party acted in accordance

[1] To the extent the issues were complicated, it was due to Samba's last-minute amendment of its infringement contentions and changing arguments that continued in the post-summary judgment motions. *See* Dkt. Nos. 379-4, 386-4.

with the law and its ethical obligations.") (citation and internal quotation marks omitted); *Bommarito v. Nw. Mut. Life Ins. Co.*, No. 2:15-CV-1187 WBS DB, 2018 WL 4657243, at *3 (E.D. Cal. Sept. 26, 2018) ("Denials [of costs] based on good faith alone would render Rule 54(d) meaningless because any unsuccessful party who acted in accordance with their obligations would be free from paying any costs.").

Further, Samba's reliance upon the Court's decision in *Grimes v. United Parcel Serv., Inc.*, No. C05-1824 RS, 2008 WL 4622589 (N.D. Cal. Oct. 17, 2008), is misplaced. In that case, the Court denied costs against an individual plaintiff that lost at trial on employment sex discrimination claims brought against a large corporation. In denying costs, the Court focused on the fact that plaintiff was an individual and that taxing costs in that situation "could . . . chill individual litigants of modest means from seeking to vindicate their rights under the civil rights laws." *Id.* at *2 (citation omitted). Neither of the Court's cited reasons exist here.

**C. Samba Should Pay the Taxed Costs Immediately**

The Court should order Samba to pay the taxable costs immediately. To determine whether to issue a stay, courts consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see Kilopass Tech. Inc. v. Sidense Corp.*, No. C 10-02066 SI, 2013 WL 843104, at *4 (N.D. Cal. Mar. 6, 2013) (applying *Hilton* to motion to stay enforcement of bill of costs).

Samba does not analyze any of these factors and cites no authority in support of its argument. Indeed, none of these factors favor a stay. *First*, Samba makes no showing that it is like to succeed on the merits on appeal, or even its Rule 59(e) motion. *Second*, Samba fails to explain how it would be irreparably injured absent a stay. "[T]he mere fact that reversal on appeal would also entail reversal or reassessment of costs does not qualify as an irreparable injury and is not a sufficient basis to stay taxation of costs." *Emblaze Ltd. v. Apple Inc.*, No. 5:11-CV-01079-PSG, 2015 WL 1304779, at *2 (N.D. Cal. Mar. 20, 2015). This is nothing more than "a mere inconvenience, and not an irreparable injury." *Kilopass Tech.*, 2013 WL 843104, at *5. *Third*,

there is a "presumptive injury to [Alphonso] from further delay of taxation of costs." *See Emblaze Ltd.*, 2015 WL 1304779, at *2. Judgment was entered on December 28, 2018. *See* Dkt. No. 368. It is undisputed that Alphonso is the prevailing party and has an interest in the prompt payment of its costs. Samba's appeal to the Federal Circuit is likely to take a significant amount of time. Alphonso will be substantially injured if it has to wait for the appeal to be resolved before it receives payment for its costs. *Fourth*, Samba does not identify any public interest that favors staying taxation of costs. "To the contrary, public policy favors prompt recovery of costs." *Emblaze Ltd.*, 2015 WL 1304779, at *3.

## IV. CONCLUSION

For the reasons stated above, Alphonso respectfully requests that the Court deny Samba's motion to review taxes. The Court should also order Samba to pay the taxable costs to Alphonso immediately.

Dated: April 10, 2019

Respectfully submitted,

By: /s/ *Neel Chatterjee*
Neel Chatterjee

**GOODWIN PROCTER LLP**

Attorneys for Defendants Alphonso Inc., Ashish Chordia, Raghu Kodige, and Lampros Kalampoukas

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on April 10, 2019. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on April 10, 2019 in Redwood City, California.

/s/ *Neel Chatterjee*
Neel Chatterjee